

OGC 76-1150
9 March 1976

MEMORANDUM FOR: NSSM-229 Members

SUBJECT : Issues and Problems with Executive Order 11652

Herewith a memorandum from me to the interagency NSSM-229 subgroup which derives from the meeting of that group on 23 February and, I believe, is self-explanatory. We are arranging a meeting as soon as possible of the Agency NSSM-229 group at which I will report on the 23 February meeting, including the attached paper.



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Associate General Counsel
Chief, General Law Division

Attachment

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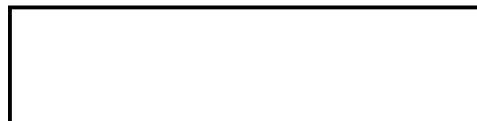
MEMORANDUM FOR: Mrs. Jeanne W. Davis, NSC Staff
Mr. Mark Grunewald, Department of Justice
Mr. Barry Roth, White House
Mr. Don Gessaman, Office of Management and Budget
Mr. Mark B. Feldman, Department of State
Mr. Jack Griffin, Energy Research and
Development Administration
Mr. James E. O'Neill, National Archives and
Records Service
Mr. Arthur F. Van Cook, Department of Defense

SUBJECT: Issues and problems with Executive Order 11652

In response to the action of the Davis group under NSSM-229 at its meeting of 23 February, we are forwarding herewith a memorandum listing problems and issues under Executive Order 11652. It was suggested at that meeting that the list forwarded by members of the group need not and indeed perhaps should not represent the coordinated formal positions of the agencies represented. The CIA paper is within that guideline. Our list represents the serious and thoughtful views of various CIA officials and components with background, experience and responsibilities in areas affected by Executive Order 11652. I have no doubt that not all of these items and comments would be agreed to by all responsible components of CIA, and I am sure that other issues and problems could be suggested and indeed we may forward an additional list at a later date. This is however our effort to suggest for Davis group consideration a number of problems and issues as seen by responsible CIA officials.

Presidential Library Review of
NSC Equities is Required

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Associate General Counsel

Attachment



9 March 1976

MEMORANDUM

SUBJECT: Issues and Problems in Executive Order 11652

1. As a preliminary, we agree with the consensus at the NSSM-229 meeting of 23 February that the objectives and purposes of E.O. 11652 are sound. Those are (a) to protect that information which, if disclosed, would damage national security, but (b) also to avoid protecting information for any other reason or for any period of time greater than that needed in order to avoid damage to national security.

2. We agree also that the Order is not working satisfactorily for various reasons, some of which may be beyond the control of the executive branch and the agencies. For example, several statutory requirements of the FOI Act, as applicable in the area of national security information (as well as other areas), realistically cannot be complied with. Other reasons are inherent in the nature and complexity of the subject matter and undoubtedly are not susceptible to ready or simple solution. Others are unnecessarily self-imposed, i.e., the Order creates administrative, managerial and other problems and burdens which are costly or otherwise undesirable.

3. As a specific item, we believe the Order does not adequately provide for the intelligence functions and needs of the Government. The potential for both duplicative and contradictory protection and controls, and therefore decontrols, stemming from the Executive Order, on the one hand, and the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods information, on the other, is an example. The "mosaic" nature of intelligence information is another. This goes to the matter of definitions and concepts. Quite possibly information in a given document or information indicating that a document is in CIA or intelligence channels alone would not damage national security, but when pieced together with other information would be highly informative in ways which would damage national security. Still another, perhaps the most important, is that the authority and ability of the intelligence agencies to protect information, in particular, the identity of sources, as perceived by foreign intelligence sources and by sources (and potential sources), both foreign and domestic.

4. It is recognized also that legislation in the area of national security information could be enacted. Such legislation of course could create additional or different administrative problems. Alternatively, legislation might provide so little or such inadequate protection that it would be necessary to continue a classification system by Executive order, based on the constitutional powers of the President, which would be additional to, and to some degree duplicative of, the statutory system.

5. Some specific items:

a. Every piece of paper created by the departments involved requires an individual classification decision. Thus numerous decisions are made every day, undoubtedly many are inconsistent with others, are not known to other persons and are modified, supported or abandoned without reference to other decisions.

b. The Order requires that classification decisions (including exemption decisions) be made only by higher level people. Given the importance and volume of the work of high level people, they simply cannot, on an informed basis, make these decisions. The result is a fairly apparent pattern of unavoidable non-compliance (i.e., those who decide simply accept whatever is recommended or put before them, and many documents originating with such people are not in compliance). The integrity of the classification system therefore is highly suspect.

c. Related to the foregoing, undue significance is given to the matter of the number of employees who are authorized to classify. With millions of pieces of paper being created throughout the Government and at installations around the world which require a classification decision, the few thousand people authorized to classify obviously cannot and do not make all the decisions which in fact are made. The result is that a system of de facto derivative authority is used, a practice which the Order seeks to prevent. Again this is a forced pattern of non-compliance.

d. ICRC is charged with duties it cannot perform, given the size of the staff and the volume of non-ICRC duties of its

members. Realistically, it is not possible to allocate sufficient resources (money and people) to provide the necessary expertise and support services. Further conceptually a Committee of departmental employees cannot monitor and regulate the policies and practices of the heads of their own departments.

e. The data index system has almost no value for the purposes of the Executive Order and in any event far less value than the millions of dollars required to establish and operate them.

f. Is it defensible to put one in jeopardy because the jeopardy is not immediate? Is jeopardy a matter of jeopardy to life, or to economic well-being or career or reputation? Whether disclosure would place in "immediate jeopardy" in almost all cases can only be a guess, particularly if the decision is made in Washington and without inquiry to field personnel. And inquiries are expensive and time-consuming and create still more classified paper.

g. Contrary to section 6 of the Order, the implementing directive required by that section was issued not "by the President acting through the National Security Council" but by the Assistant to the President for National Security Affairs. Moreover, the directive is far broader than section 6 or indeed of Executive Order 11652.

h. The Order and directive require such specific markings and processing of documents and other administrative details that non-compliance effectively cannot be avoided.

i. Information and reports of little or no value are required.

j. The protection afforded "classified information furnished by a foreign government" by sections 4(c) and 5(B)(1) may be inadequate as to information furnished by a foreign intelligence service or by a representative of a foreign government or a foreign intelligence service.

Some furnished information may not have been classified by the source or the foreign government. A court might hold that a representative of the Government is not the Government.



Associate General Counsel

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17 February 1976

SUBJECT : Interagency Group on NSSM 229

1. The interagency group created by NSSM 229 (August 1975) met for the first time today. It was chaired by Bill Hyland, Deputy Assistant to the President for National Security Affairs. Representing the agencies were Bill Blair of State, David Cooke of Defense, Mark Grunewald of Justice, Barry Roth of Buchen's office, Jeanne Davis and Clint Granger of the National Security Council staff and [redacted] of CIA. A number of assistants and other backup people were also present.

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2. It was concluded that a working group of representatives of this group is to be formed, and its first meeting is to be Friday of this week at 1500 hours. We are to notify Jeanne Davis of our member, and she will advise us where the meeting is to be held. The charter of this working group, at least at the initial meeting, is to suggest issues involved in the Executive order. Prior to the Friday meeting, the NSC staff will prepare section headings by way of an outline of what might become a new Executive order. The issues which the working group will bring to Friday's meeting will then be looked at in the light of the Executive order outline for further consideration of the next steps. The charter was essentially vague, however, and I am sure one of the constant problems for the working group will be to have an agreed understanding of what its function is.

3. A central theme to most comments at today's session was that the work of the NSSM 229 group should not serve to invite legislation which might not otherwise be forthcoming or to induce more severe legislation than would otherwise occur. It was generally assumed that legislation in the area of classified information is almost inevitable, but it was suggested that it might not happen in this session. On the other hand, I suggested that the priority interest to which the group's work should be directed is that of providing necessary protection. The objective of preventing over-protection, that is, too much classification or classification for too long, should be only the secondary objective of this study. Bill Blair of State expressed agreement with this, and Jeanne Davis was quite strong in urging that the NSSM group should propose whatever may be necessary

or desirable. It was indicated that the executive branch has done better in implementing E.O. 11652 and in cutting down on overclassification than is generally realized. It was suggested that the executive branch has not adequately made this known.

4. Nothing in the discussions showed any real interest or knowledge of those matters which caused NSSM 229 to be issued, other than Jeanne Davis' expertise. It continues to appear that the NSSM was originated at the NSC staff level and that senior NSC personnel (Scowcroft and Hyland) are not yet involved in any depth. The significance of this is that there does not appear to be any strongly held, high-level NSC views.

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[Redacted Signature Box]

Associate General Counsel

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